IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 29.11.2006

CORAM

THE HONOURABLE MR.JUSTICE K.MOHANRAM

A.S.No.954 OF 1991

N.Jayavel .. Appellant

Vs.

M.Nallammal .. Respondent

prayer: This appeal has been filed u/s 96 CPC against the judgment and decree, dated 14.03.1991, passed in O.S.No.485 of 1990 on the file of the Principal Subordinate Judge, Salem.

For Appellant : Mr.Mathivanan
For Respondent: Mr.Jayaraman

JUDGMENT

The unsuccessful plaintiff in O.S.no.485 of 1990 on the file of the Principal Subordinate Court, Salem, is the appellant in the above appeal. For the sack of convenience the parties are referred to as they are arrayed in the suit.

2. The plaintiff has filed the suit seeking partition of the suit properties into four equal shares and for allotment of three shares to him and for permanent injunction against the defendant from in any way encumbering or alienating the suit properties.

3. The claim of the plaintiff is based on the plea that he was adopted by the husband of the defendant viz, Muthu Gouder and the defendant on 17.4.1978. The plaintiff is none other than the son of the brother of the defendant's husband. According to the plaintiff, while the said Muthu Gounder was alive there were ancestral properties and the same had been sold by Muthu Gounder, his parents and Muthu Gounder's brother Natesan and from that amount Muthu Gounder carried on Real Estate business and out of the huge amount earned by Muthu Gounder, he purchased landed properties in his name and in the name of the defendant and he also had cash on hand. The said Muthu Gounder died intestate on 14.09.1985 and the plaintiff performed obsequies ceremonies of Muthu Gounder.

4. It is the further case of the plaintiff that out of the amount left by Muthu Gounder, the defendant had purchased a house property,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

which is shown as Item No.1 in the suit schedule, in the name of the defendant and the plaintiff claimed that he was residing with the defendant. Further, the defendant had insured with the pearless General Finance and Investment Company Ltd, and in that Insurance Policy, the defendant had nominated the plaintiff and mentioned him as her son. Due to misunderstanding between the plaintiff and the defendant, the defendant was making hectic attempts to dispose off the suit properties. It is further stated in the plaint that the defendant filed a suit against one Rathinasabapathi for recovery of Rs.25,000/- borrowed by him from Muthu Gounder and the plaintiff claims 3/4th share in the amount due from the said Rathinasabapathi. Since the defendant is not agreeable for the partition, the suit has been filed.

5. The defendant by filing a detailed written statement contested the suit, inter-alea contending that the claim of adoption of the plaintiff by the defendant and her husband is false; the plaintiff was not under the care and custody of Muthu Gounder and the plaintiff was not a member of the joint family; the factum of nominating the plaintiff in the Peerless Policy does not give the plaintiff the status of a son; there were disputes between the brothers and Muthu Gounder which obliged Muthu Gounder to give a release deed to Natesan, father of the plaintiff; the parties were not in good terms after 1972 and therefore the averment that the plaintiff was given in adoption is untrue. The defendant has further contended that Muthu Gounder did not possess any ancestral property at all and the alleged earnings and purchase of properties are denied by the defendant; the plaintiff did not perform the obsequies ceremonies of Muthu Gounder; the amount due from Rathinasabapathi belongs to the defendant only and Muthu Gouder never purchased properties in the name of the defendant; the property was purchased only by the defendant out of the amounts given by her family members. It is further contended that the house property described in the suit schedule was not purchased from out of the funds of Muthu Gounder and the plaintiff is not entitled to claim any share in the suit properties. On the above pleadings the defendant sought for dismissal of the suit.

6. The trial Court framed the following five issues:

i) Whether the claim of the plaintiff that he was adopted by the Defendant and her deceased husband on 17.04.1978 is as per law and whether it is valid?

ii) Whether there was any ancestral properties belonging to the deceased Muthu Gounder?

iii) Whether the plaintiff is entitled to seek partition and injunction as prayed for in the suit?

iv) Whether the suit has been correctly valued by the plaintiff?

v) To what relief the plaintiff is entitled to?

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

7. During trial the plaintiff has examined himself as P.W.1 and three other witnesses have been examined as P.W.2 to 4 and Ex.A.1 to 7 have been marked on the side of the plaintiff. The defendant got herself examined as D.W.1 and Ex.B.1 to B.22 have been marked on her side.

8. The trial Court on an elaborate consideration of the oral and the documentary evidence available on record disbelieved the plea of adoption putforth by the plaintiff and further found that Muthu Gounder was not possessed of any ancestral properties. Being aggrieved by that, the plaintiff has filed the above appeal.

9. Heard both. Mr.Mathivanan, the learned counsel for the plaintiff/appellant herein, submitted that the Court below is not correct in rejecting Ex.A.4-peerless policy and the reasons recorded by the trial Court for rejecting Ex.A.4 are not correct. The learned counsel further submitted that though the plaintiff besides examining himself as P.W.1, examined P.Ws.2 to 4 to prove his adoption by the defendant and her husband, their oral evidence has not been properly considered by the trial Court. The learned counsel further submitted that the findings of the trial Court that Muthu Gounder had no ancestral properties is also erroneous. Apart from the above submissions, the learned counsel for the plaintiff did not make any other submission.

10. Per contra, Mr.Jeyaraman, learned counsel for the defendant/respondent, submitted that as per Section 11(vi) of the Hindu Adoptions and Maintenance Act, 1956 (herein after referred to as the Act) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. But in this case, even in the plaint such a pleading has not been made. The learned counsel submitted that in the plaint it is not stated that the plaintiff was actually given in adoption by his natural parents and Muthu Gounder and his wife, the defendant, took him in adoption and only averment found in the plaint is that "Muthu Gounder and the defendant adopted the plaintiff with the consent of the plaintiff's parents on 17.04.1978". The learned counsel for the defendant/respondent further submitted that in the absence of specific pleadings satisfying the legal requirements of Section 11(vi) of the Act, any amount of oral evidence adduced by the plaintiff cannot be looked into. In support of his contention the learned counsel relied on the decision of the Apex Court reported in 2006(8)SCC 367 (M.Gurudas and others Vs. Rasaranjan and others). The learned counsel further submitted that the trial Court has elaborately considered the oral evidence of P.Ws.1 to 4 and for reasons recorded disbelieved them. According to the learned counsel, when the factum of adoption itself has not been proved this Court need not even consider the other issues.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

11. I have considered the submissions made on either side. The main point that arises for consideration in this appeal is whether the plaintiff was adopted by Muthu Gounder and his wife, the defendant, as their son on 17.04.1978 as claimed by the plaintiff. In the considered view of this Court, for the reasons stated hereinafter, the adoption claimed by the plaintiff/appellant has not been proved and the other issues do not require consideration.

12. Section 11(vi) of the Act reads as follows:-

> "Section 11:- In every adoption, the following conditions must be complied with:-
>
> i) .....
> ii) .....
> iii).....
> iv) .....
> v) .....
> vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption.

13. In the decision reported in 2006(8)SCC 367 (M.Gurudas and others Vs. Rasaranjan and others), which is relied upon by the learned counsel for the respondent, it is observed by the Honourable Apex Court at para 26 as follows:

> "To prove valid adoption under Hindu Law, it would be necessary to bring on record that there had been an actual giving and taking ceremony."

If Section 11(vi) of the Act is considered, in the light of the law laid down by the Honourable Apex Court in the above said decision as well as in the light of the settled principles of law, it can be safely stated that the giving and taking of the child is the sine qunon or the mandatory requirement for a valid adoption. It is not essential that giving and taking should be in any particular form. All the same, the formality of giving and taking the child should be observed. It is not essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The parents after exercising their volition to give and take the boy in adoption may both or either of them delegate the physical act of handing over the boy or receiving him as the case may be to a third party. In this regard it is useful to refer the decision reported in AIR 1961 SC 1378 (Laxman Singh Vs. Rup Kumar), wherein it has been observed as follows:-

> "The law may be briefly stated thus: Under the the Hindu Law, whether among the regenerate caste or among

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

The above statement of law now stands reflected in the provisions contained in Section 11(vi) of the Act.

14.In the decision reported in AIR 1970 SC 1286 (Devi Prasad Vs. Tribeni Prasad), it is observed that the giving and receiving of boy are absolutely necessary to the validity of an adoption and for a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption and the boy shall be handed over and taken for this purpose.

15.In AIR 1974 SC 2161 (Kartar Singh Vs. Surgan Singh), it has been observed as follows:

"The words in Section 11, clause (vi) of the Act "with intent to transfer the child from the family of its birth to the family of its adoption" are merely indicative of the result of actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place there cannot be any other intention. The parties did not intend to go through a play acting or to put up a show. They obviously intended to comply with the requirement of law that for a valid adoption there must be giving and taking."

16. The very act of giving and taking is in itself symbolic of transplanting the adopted child from the family of its birth to the adoptive family. Therefore, it is clear that if the act of giving and taking is lacking the adoption is invalid. In the light of the above legal principles, if the case on hand is considered it has to be pointed out that, as rightly contended by the learned counsel for the respondent, the plaintiff/appellant herein has not even avered in the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

plaint that there had been an actual giving and taking ceremony and the actual parents of the plaintiff/appellant gave him in adoption to Muthu Gounder and his wife, the respondent herein, and they in turn took the plaintiff/appellant in adoption. The mere averment that "Muthu Gounder and the defendant adopted the plaintiff with the consent of the plaintiff's parents on 17.04.1978" is not sufficient. Therefore, in the absence of such specific pleading in the plaint, the oral evidence adduced by the plaintiff to prove the adoption could not be looked into. It is settled law that any amount of oral evidence in the absence of pleadings, cannot be looked into.

17.Further, it should be pointed out that the trial Court after elaborately considering the oral evidence of P.Ws.1 to 4 has pointed out so many material contradictions in their evidence. The material contradictions pointed out by the trial Court are in respect of the place of adoption, the persons who were present during the alleged adoption ceremony, etc,. P.W.3 is none other than the brother-in-law of P.W.4 and P.W.3 is the brother-in-law of the plaintiff(P.W.1). Against P.W.4, admittedly the defendant had filed a suit for recovery of money and there is admission by P.W.4 that due to the filing of the suit there is enmity between him and the defendant.

18. The trial Court has also pointed out that P.Ws.2 to 4 do not belong to the same village and they hail from a deferent village. P.W.1 has claimed in his evidence that all of a sudden, on a single day it was decided that he should be given in adoption and immediately the formalities were fulfilled, whereas the witnesses examined on his side claimed that they were informed in advance and they came in advance to attend the adoption ceremony, which falsifies the testimony of P.W.1. Pointing out all these aspects and other discrepancies in the evidence of the witnesses examined on the side of the plaintiff, the trial Court has totally disbelieved them. This Court sees no reason to differ from the conclusions reached by the trial Court. As pointed out above, when the plaintiff has not even pleaded the legal requirements for a valid adoption and the same has not been established by acceptabel evidence, it must be held that the plea of adoption putforth by the plaintiff/appellant should fail. Therefore the judgment and decree of the trial Court is perfectly in order and there is no reason to interfere with the same. In view of the said

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

finding the other issues framed by the trial Court do not require any consideration by this Court. Accordingly, the appeal fails and the same is dismissed. No costs.

ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

TO

1. THE PRINCIPAL SUBORDINATE JUDGE,
SALEM. (With records)

2. THE RECORD KEEPER
VR SECTION, HIGH COURT,
MADRAS.

ONE CC TO MR.S. SUBRAMANIAM, ADVOCATE SR 58881

A.S.No.954 OF 1991

MM(CO)

BP/15.12 29.11.2006

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/